

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RECEIVED
NOV 25 1981

Judge George N. Leighton
U. S. District Court

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NOV 30 1981

ATARI, INC.,)
)
a Delaware corporation, and)
)
MIDWAY MFG. CO.,)
)
an Illinois corporation,)
)
Plaintiffs,)
)
vs.)
)
NORTH AMERICAN PHILIPS)
CONSUMER ELECTRONICS CORP.,)
)
a Tennessee corporation, and)
)
PARK TELEVISION d/b/a)
PARK MAGNAVOX HOME ENTERTAINMENT)
CENTER,)
)
an Illinois partnership,)
)
Defendants.)

Civil Action No. 81 C 6434

The Honorable
George N. Leighton

DEFENDANTS' PROPOSED PRELIMINARY FINDINGS
OF FACT AND CONCLUSIONS OF LAW

The Court has held an evidentiary hearing on November 25, 1981 on plaintiffs' motion for a preliminary injunction in this action. Now, having heard the testimony of witnesses, having reviewed all of the exhibits, and having heard arguments of counsel for the parties, the Court makes the following findings of fact and conclusions of law.

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FINDINGS OF FACT

1. The complaint in this action sets forth three counts, the first of which is for copyright infringement, the second is for deceptive trade practices, and the third is for common law unfair competition.

2. The verified complaint alleges that plaintiff Atari, Inc. ("Atari") is a Delaware corporation with its principal place of business in Sunnyvale, California. It is further alleged that Atari is a leading developer and manufacturer of home video games and personal computers, and further, that Atari owns the exclusive rights under copyrights to numerous audio-visual works, including the exclusive rights in the United States for home video and personal computer use for the "PAC-MAN" video game.

3. The verified complaint also alleges that the plaintiff Midway Mfg. Co. ("Midway") is an Illinois corporation with its principal place of business at Franklin Park, Illinois. The complaint further alleges that Midway is a leading developer and manufacturer of coin-operated video games, and also, that Midway owns exclusive rights under copyrights to numerous audio-visual works and is the owner of the United States copyright to the "PAC-MAN" audio-visual work.

4. The verified complaint alleges that defendant North American Philips Consumer Electronics Corp. ("North

American") is a Tennessee corporation with its principal place of business in Knoxville, Tennessee and having an office and place of business in this district at 7500 Frontage Road, Skokie, Illinois. North American manufactures and sells home video games.

5. The verified complaint alleges that defendant Park Magnavox Home Entertainment Center ("Park") is an Illinois corporation with its principal office and place of business at 3634 West 95th Street, Evergreen Park, Illinois. Park is a retailer of audio-visual equipment including home video games such as North American's "K. C. MUNCHKIN" video game cartridge. For purposes of this motion for a preliminary injunction, the defendants do not dispute the foregoing identifications of the parties as asserted in the complaint.

6. The verified complaint asserts that the copyright infringement claim arises under the copyright laws of the United States, 17 U.S.C. §§101 et seq. and that the other claims arise under the Illinois Uniform Deceptive Trade Practices Act, Ill.Rev.Stat., ch. 121-1/2, §§311-317, and the common law. This Court is asserted to have federal question jurisdiction pursuant to 28 U.S.C. §§1331(a)(2) and 1338(a) and has pendent jurisdiction over the state law claims under 28 U.S.C. §1338(b). Venue is premised upon 28 U.S.C. §§1391(d) and 1400(a). Further, it is asserted that acts giving rise to the causes of action alleged in the complaint have occurred, and are occurring in this district.

For purposes of this motion for a preliminary injunction, the jurisdictional and venue allegations of the complaint are not disputed by the defendants.

7. The following are the factual premises asserted in the complaint.

(a) Before May 22, 1980, Namco Limited, a Japanese company, created an audio-visual work entitled "PAC-MAN" and, in an instrument entitled "Assignment of Copyrights" dated October 10, 1980, assigned the entire right, title and interest in a statutory copyright in the United States and the Western Hemisphere to Midway. The Register of Copyrights has issued to Midway a Certificate of Copyright Registration for the "PAC-MAN" audio-visual work, Registration No. PA83-768, effective November 13, 1980, a copy of which Certificate is attached to the verified complaint.

(b) By licenses stemming from Midway, Atari was granted the exclusive right in the United States and its territories in the copyright and trademark for "PAC-MAN" audio-visual work for home video games and personal computers, and this license to Atari was filed with the Copyright Office for recordation on November 12, 1981. A copy of this license to Atari is also attached to the complaint.

(c) Atari has announced that it will introduce the "PAC-MAN" home video game throughout the United States during 1982.

(d) North American is charged with infringement of the copyright in the "PAC-MAN" audio-visual work by reproducing, selling and otherwise distributing copies of or, a derivative work of the "PAC-MAN" audio-visual work under the name "K. C. MUNCHKIN," a video game cartridge.

(e) North American is currently advertising, distributing and selling its "K. C. MUNCHKIN" video game cartridge on a nationwide basis. An advertisement which appeared in the November 16, 1981 issue of Newsweek magazine is attached to the complaint, and North American has made arrangements for additional national advertising for the "K. C. MUNCHKIN" video game cartridge in Time, People, and various in-flight airline magazines.

(f) North American's advertising, marketing and distributing for retail sale of the "K. C. MUNCHKIN" home video game cartridge have provided, it is alleged, and are currently providing North American's distributors and retail dealers with the instrumentality and opportunity to engage in deceptive and unfair trade practices. Such practices are said to include passing off the

"K. C. MUNCHKIN" home video game cartridge as a "PAC-MAN" game, and cause a likelihood of confusion or misunderstanding as to the source, sponsorship, approval, or certification of the "K. C. MUNCHKIN" game. These practices also allegedly cause likelihood of confusion or misunderstanding as to affiliation, connection, or association with or certification by plaintiffs.

(g) The complaint alleges that North American's distributors have and are currently holding out the "K. C. MUNCHKIN" home video game cartridge as a "PAC-MAN" game as shown in an advertisement from the November 13, 1981 issue of the Chicago Sun-times, a copy of which is said to be attached to the verified complaint as Exhibit D.

(h) Such alleged infringement and unfair and deceptive trade practices by North American are said to have been willful and deliberate, and will cause plaintiffs irreparable harm unless enjoined by the Court.

(i) Park has, it is alleged, infringed the copyright in the "PAC-MAN" audio-visual work by selling and otherwise distributing the "K. C. MUNCHKIN" video game cartridge and by performing and displaying the game playable with that cartridge.

7A. Plaintiff Midway is in the business of manufacturing and selling, among other things, coin-operated television games intended for use in arcades, bars, restaurants, airports,

and similar public places. One such coin-operated television game of Midway is the game sold under its name "PAC-MAN". Midway is not in the business of manufacturing or selling television games to consumers for use in their homes.

7B. Plaintiff Atari is in the business of manufacturing and selling, among other things, coin-operated television games, home television games and game cartridges, and personal computers.

7C. Defendant North American is in the business of manufacturing and selling, among other things, home television games and game cartridges.

7D. North American and Atari each manufacture and sell a home television game console under their own names or trademarks. Those game consoles are intended to be connected to the antenna terminals of a television receiver so that the game to be played is displayed on the television receiver. The game console itself is incapable of being used to play any game. A game cartridge must be inserted into the console to permit use of the console to play a game. Each cartridge contains therein a read only memory or "ROM" which includes the information needed by the electronic circuitry within the console to permit the playing of the respective games.

7E. North American sells its television game console under its trademark ODYSSEY². North American presently

manufactures and sells approximately thirty-five different cartridges for the playing of different games with its Odyssey² television game console. The game cartridges manufactured and sold by North American are useful in the Odyssey² television game consoles only; they are not useful in the television game consoles of any other party including plaintiff Atari.

7F. Atari sells its television game consoles under the name Video Computer System. Atari presently manufactures and sells approximately forty-five different cartridges for the playing of games with its Video Computer System television game console. The game cartridges manufactured and sold by Atari are useful in the Video Computer System television game consoles only; they are not useful in the television game consoles of any other party including defendant North American.

7G. One of the television game cartridges sold by North American is sold under the trademark "K. C. MUNCHKIN". Plaintiffs allege that the manufacture and sale of the "K. C. MUNCHKIN" television game cartridge constitute the acts of copyright infringement and unfair trade practices referred to in the complaint.

8. The Court has viewed the parties' games in question, including a video tape of the "PAC-MAN" game which is alleged to have been deposited in the Copyright Office, the present arcade version of "PAC-MAN" (which is the only form of "PAC-MAN" on the market at this time), and an example of the defendants' "K. C. MUNCHKIN" video game cartridge. The "K. C. MUNCHKIN" game cartridge was plugged into an ODYSSEY² television game console which was attached to the antenna terminals of a home television receiver, and the "K. C. MUNCHKIN" game was played over such a receiver during the proceedings on this motion.

9. The defendants have denied the allegations of the complaint to the extent that such allegations assert copyright infringement or copying or acts of unfair competition or deceptive trade practices, but have otherwise accepted the operative facts pleaded in the complaint as stated above for the purposes of this motion for a preliminary injunction.

10. The "PAC-MAN" game which is on the market now is an arcade game. It is housed in a structure about six feet tall and approximately twenty-four inches wide with a viewing plate facing diagonally upwards toward a player who stands in front of it. Through the viewing plate a player sees a television type display having a maze and a number of characters, one of which is a yellow dot with a V-shaped opening at one side which opens and closes like a mouth.

The maze appears in double blue lines, and throughout the maze are several hundred evenly spaced pink dots which the central, yellow character gobbles as he moves through the maze. There are four other moving figures or characters, identical except that one is red, one blue, one turquoise, and one orange. All of these four characters, or goblins, have eyes and appendages which simulate feet. The goblins do not consume the dots, and they move in a prearranged pattern about the maze which is unchanging. In the center of the maze is a blue box to which the goblins return each time the player begins a game, or play. Four of the pink dots which are located at approximately the four corners of the maze are enlarged and when the central figure, the gobbler, consumes those dots, the goblins change color to blue. When the goblins are in their original variety of colors, the central character is vulnerable, so that when the central character and one of the goblins collide, the central character is deflated (with accompanying audible sounds) and that particular play, but not the game, is finished. When the goblins turn to blue for a few seconds, they are vulnerable to the gobbler and can be consumed by it, thus scoring points for the player. The player also gains points by avoiding the goblins and consuming the normal sized pink dots in the maze. The player may additionally gain points by consuming various fruit symbols placed near

the center of the maze. The game is controlled by a joy stick on the front of the arcade structure so that a player can guide the gobbler up or down, and left or right, through the fixed maze.

11. Throughout the play of the arcade form of "PAC-MAN," a number of musical notes are played for the audio portion of the game and also a number of whistles and siren-like sounds appear in the background.

12. The Court viewed a video tape of the "PAC-MAN" game which was taken from the face of an arcade game. This form of "PAC-MAN" was said to be the form of the game which was filed in the Copyright Office at the time the copyright for the "PAC-MAN" game was registered. The maze appears in a different color, and so do the characters, as contrasted with the arcade form of the game, and the play of the game was preset and controlled, and not available for independent control by the Court or any of the witnesses. It included an attract mode, a one player mode, and a two player mode. There were also audio-visual interludes between plays.

13. Apparently, because of the need to submit a form to the Copyright Office which could be deposited there, the form of the "PAC-MAN" game which was played over the television set in court appeared sideways, i.e., in a direction ninety degrees turned from the vertical position of the game shown in the arcade form.

14. The Court, as noted above, has viewed the "K. C. MUNCHKIN" game. This game was shown through the home television set in the courtroom because that is the equipment for which the game is intended. The testimony showed that there were several technical requirements which applied to the presentation of the home video game which were quite different from the technical requirements for presenting a game in an arcade type of viewer. These technical requirements in themselves resulted in a substantially different visual display. The "K. C. MUNCHKIN" game is a maze/chase game, but the maze appears on the home video screen as broader than it is tall, and there were more horizontal passageways in which the characters could move than in the "PAC-MAN" game. In the "K. C. MUNCHKIN" game, there is a practically infinite number of mazes, all of which give different patterns as a matter of mechanics, as a matter of appearance, and as a matter of play tactics and technique. There is no such variability in the "PAC-MAN" game.

15. The characters in the "K. C. MUNCHKIN" game appeared distinctly differently from anything in the "PAC-MAN" game. In "K. C. MUNCHKIN," the central character, the Munchkin, appears as a blue figure with horns, normally with a smile, but when he is attacked by a monster, his smile turns to a frown and then he evaporates upwardly from the screen. The character or the appearance of the central

figure is that he initially faces the viewer rather than showing a profile. As he moves along the maze he shows a profile, and when he stops, he turns around to face the viewer with another smile. Thus, the central character seems to have a personality which the central character in the "PAC-MAN" game does not have.

16. The "K. C. MUNCHKIN" game has Munchers which are much spookier than the goblins in the "PAC-MAN" game. Their legs are longer and move more dramatically and their eyes are vacant, all of these features not being in the "PAC-MAN" game. The Munchers are red, green, and yellow.

17. One of the more apparent and substantial differences from the point of view of play of the two games is the changing orientation of the center of the maze in the "K. C. MUNCHKIN" game. In the "PAC-MAN" game, the center portion of the maze is elongated to accommodate the goblins and is stationary, never changing. The goblins simply move upward out of a fixed center "box" into the maze, while in the "K. C. MUNCHKIN" game, the first mode of play shows the center of the maze as a box changing the open side by ninety degrees every two or three seconds.

18. There are only twelve dots in the "K. C. MUNCHKIN" game as opposed to over two hundred dots in the "PAC-MAN" game. In "K. C. MUNCHKIN," the dots are randomly spaced, whereas in "PAC-MAN," the dots are uniformly spaced.

Furthermore, in the "K. C. MUNCHKIN" game, the dots are square and are always moving, and when the game is played, it becomes progressively more difficult for the central character to catch the remaining dots after he consumes the first one or two. The remaining dots accelerate so that toward the end the dots reach the same speed as the Munchkin. The last dot is the most difficult to catch. It cannot be caught by overtaking it; it must be munched by strategy.

19. It is necessary in playing the "K. C. MUNCHKIN" game to out-think the movements of the dots which is not the way that the "PAC-MAN" game is played. In the "K. C. MUNCHKIN" game, the player must observe the whole grid and anticipate the movements of the characters and dots, while in the "PAC-MAN" game, the characters follow a set pattern which, the testimony showed, was a pattern which a skilled player could determine fairly readily. The dots do not move at all.

20. In the "K. C. MUNCHKIN" game, in several of the modes of play the maze is a periodically changing pattern and/or is a disappearing maze, that is, the maze appears on the screen when the player stops moving the Munchkin and disappears when the Munchkin is in motion, so that the person who is playing the game has to anticipate where the walls of the maze might be. These disappearing maze modes are not present in the "PAC-MAN" game. In the

"K. C. MUNCHKIN" game, it is possible for a player to program the maze shown on the screen by operation of the console. Stated another way, the player might draw on the screen whatever walls he wishes to create in the maze, thus creating a continuously changing maze from game to game, another significant difference in appearance from the fixed maze of the "PAC-MAN" game.

21. The "K. C. MUNCHKIN" game, according to the uncontradicted testimony, has a set of sounds accompanying it which are distinctive to the whole line of ODYSSEY home video games. These sounds are not at all like the sounds which were played in the arcade form of the "PAC-MAN" game. The tone sequences are different, the notes are different, and create an entirely different impression on the listener. It appears that the reason for the sounds in the "PAC-MAN" game is because the game is installed in arcades in which there are many competing noises from neighboring games and players.

22. The "K. C. MUNCHKIN" game was created for defendant North American by Mr. Ed Averett, who testified at the preliminary injunction proceedings. Mr. Averett is an independent contractor and has been a consultant to North American in creating home video games for the last four years. He has developed approximately 21 such games, one of which was called "TAKE THE MONEY AND RUN." That game is a

maze chase game in which a player character chases a game controlled character during one phase of the game, and during another phase of the game, the roles are changed to reverse the chase. When the party being pursued is caught, he disappears, which is the same concept as in the "K. C. MUNCHKIN" game. Mr. Averett works with his wife at home in developing home video games. He is in the fortunate position that his wife is also a highly skilled computer programmer and the two of them are said to possess the highest skill of any known home video game developers for the ODYSSEY² television game console because they have a complete knowledge of the mechanics of the electronic components which make up that console. In the development of "K. C. MUNCHKIN," Mr. Averett's wife offered several suggestions which were adopted in the creation of "K. C. MUNCHKIN," the most notable of which was the moving dot principle.

23. Mr. Averett and another person, a Mr. Ralph Staup, who is in charge of home video game product development for the defendant North American, were returning from Europe to the United States in February, 1980, and as the two of them were coming through an airport in New York City, they stopped to review the games which were then in an arcade in the airport. One of the games was the "PAC-MAN" game which they both saw there for the first time. Both of them testified that they did not recall playing it then. Mr. Averett

was not impressed with the game at the time because he did not believe that it had enough violence for consumer appeal in an arcade setting. He testified also that he did not recognize an appeal which the lesser violence of the game might have upon women, a market which was growing at the time but substantially undeveloped. Mr. Averett also testified that he recognized the concept in the "PAC-MAN" game of a maze chase game in which the central character was either pursued or the pursuer and that the characters were gobbled up when captured.

24. Mr. Staup and Mr. Averett were in the habit of frequently discussing new home video games for North American, and sometime after seeing the "PAC-MAN" game in the New York airport, Mr. Staup and Mr. Averett considered developing a maze chase game which would include the concept of a central character gobbling up dots and having enemies which could gobble the character. Mr. Averett and his wife, who is associated with him in the development of entertainment software, went to work on the creation of such a game. While they were in the process, they considered whether North American might obtain a license from the owner of any rights in the "PAC-MAN" game and Mr. Staup initiated an inquiry. Mr. Averett testified that ordinarily he does not like to be restricted to the parameters of license agreements in duplicating games which have already appeared in arcade

form because of the limits on his creative expression and technical difficulties in transferring arcade games to the home video electronic equipment. Such restrictions tended to hamper the original aspects of the games which he and his wife preferred to work on. Consequently, he also testified, he was pleased when he found in June of 1981 that a license under "PAC-MAN" rights was not available, and this was especially true because he and his wife had progressed a substantial way in developing the forerunner of the "K. C. MUNCHKIN" game and did not then have to change or destroy much of their work which had already been expended.

25. Mr. Averett showed an initial version of "K. C. MUNCHKIN," although it was not known by that name at that time, to Mr. Staup in July. North American considered that initial version. That initial version included several features which Mr. Averett was attempting to build into a maze/chase game, namely, the principle of changing the mazes not only from mode to mode, but also to have the mazes change during the course of each game and to make them programmable. Mr. Averett and his wife were both quite enthusiastic about the use of movable dots to be caught, both from the standpoint of building challenges into a game and also from the attractiveness of the game to a home video game player. The movement of the dots makes a maze/chase game much more challenging to play and less likely to lose interest for players over a period of time. The movements

of the Munchers was another item which he wanted to exercise creativity upon, and in creating the "K. C. MUNCHKIN" game, he wanted to give the Munchers the appearance of thinking so that they would be challenging to avoid. Accordingly, Mr. Averett and his wife built into the "K. C. MUNCHKIN" game the need for a player to out-maneuver or trap the dots as they move about the mazes and to out-think both the dots and the Munchers as they move in apparently purposeful fashion. Mr. Averett testified that it was necessary to trap the dots through skill rather than to simply chase them around. These features which Mr. Averett sought to achieve in the initial version of the "K. C. MUNCHKIN" game have been carried over into the final version viewed by the Court and distinguish the "K. C. MUNCHKIN" game from the "PAC-MAN" game.

26. Mr. Staup and others at North American were concerned, however, that there might be difficulties with the plaintiffs in this action even though the initial version of the "K. C. MUNCHKIN" game was quite different from "PAC-MAN." They urged Mr. Averett to create even more differences, and consequently the Munchkin central character was given a more different appearance than he already had by changing his shape, adding antennas, and changing his color from yellow to blue. The colors of the Munchers themselves were changed in order to get away from even a cosmetic similarity

which could exist with some of the colors in the "PAC-MAN" game.

27. The testimony from North American's witnesses showed that North American had created a new game with new play technique without even any cosmetic similarity to "PAC-MAN." Moreover, North American exercised every effort to avoid even a possibility of difficulties arising with the plaintiffs. They concluded that no references of any kind should be made to any names of the characters in the "PAC-MAN" game (i.e., Inky, Winky, Blinky, and Clyde) or the game itself. They decided at that time to call the North American game "K. C. MUNCHKIN" after the President of the Consumer Electronics Division of North American, Kenneth C. Meinken. The colors of all of the characters were different from those in "PAC-MAN" and every conceivable effort was exercised to avoid any mechanical or cosmetic clashes. The theory of play was also stressed as well as the changes in play brought about by the changing mazes.

28. The revised version of "K. C. MUNCHKIN" was approved by the defendant North American in August and production was begun.

29. Mr. Averett testified that he played "PAC-MAN" once or twice prior to submission of the initial version to defendant North American and never since then until just a few days ago in preparation for this hearing.

30. As seen by the ordinary person who has a wide familiarity with video games including the play of those games, "K. C. MUNCHKIN" is unique because it displays a different theory of play than any of the other games which were demonstrated by the evidence in this case. "K. C. MUNCHKIN" is substantially different from "PAC-MAN," especially because of the changing center of the maze, which overall is different from "PAC-MAN," because of the moving dots which the central character, the Munchkin, must chase, because the maze is changing or disappearing, and because the Munchkin does not move fast enough to catch the Munchers. The "K. C. MUNCHKIN" game is much more challenging than "PAC-MAN" because of the changing maze and because of the increasing difficulty in having the central character catch the dots as fewer and fewer appear on the screen. Both games are in the genre of the many maze/chase games with a central character who gobbles up enemies. This genre also includes such earlier games as Mr. Averett's "TAKE THE MONEY AND RUN" which was demonstrated for the Court and the Gremlin game "HEAD ON." Moreover, there are different modes in the "K. C. MUNCHKIN" game in the same cartridge, and the person who plays the "K. C. MUNCHKIN" game can vary the maze as he wishes from game to game. Even the scoring is very different with the high player able to enter his name on the screen and a display of only one player's score. Also, "PAC-MAN"

uses various fruit symbols which are not included in "K. C. MUNCHKIN."

31. Not only are the two games in suit substantially different, but North American has consciously and intentionally tried to avoid any possible conflict or confusion between the "K. C. MUNCHKIN" game and the "PAC-MAN" game. Internal instructions have been given within the defendant company to avoid use of all tradenames and trademarks or other trade designations of others in conjunction with the promotion of the "K. C. MUNCHKIN" game. Even more specifically, the instructions have been to avoid any reference to the "PAC-MAN" game. In memoranda of October 27 and November 27, 1981, addressed to its sales force, North American stressed these points. North American's advertisements referring to its "K. C. MUNCHKIN" video game cartridge, its packaging for that cartridge, and the instruction manual for that cartridge do not include any material which could result in any confusion with the "PAC-MAN" game.

32. So far as the November 13, 1981 advertisement by Minnesota Fats is concerned, North American is not responsible for the actions of that dealer. Minnesota Fats is an independent retailer who purchases home video games from North American, but is in no way controlled by or obligated to North American. Minnesota Fats does not now receive any advertising allowance from North American for games and has not for some time past.

33. Some dealers in the Chicago area are on a cooperative advertising basis with North American, but not Minnesota Fats. The co-op advertising dealer submits ads to North American for prior approval, and all approvals of cooperative advertising come to the attention of North American's District General Manager, Mr. Ronald E. Giese. Mr. Giese exercises studious effort to pursue North American's policy of avoiding any use of anyone else's trademarks, trade names, or any other trade designation. The November 13, 1981 advertisement of Minnesota Fats would have come across Mr. Giese's desk if that dealer were in a co-op program with North American, but in fact the November 13, 1981 advertisement never came to Mr. Giese for approval because there was no such arrangement in existence between Minnesota Fats and North American. Mr. Giese would not have approved that advertisement if it had come to his attention, in particular and solely for the reason that it makes a reference to "PAC-MAN." Mr. Giese knows of no one else in his Division of North American, which sales territory includes Chicago and the approximately ten states in the Great Lakes area, who would have either considered or approved the Minnesota Fats ad.

34. Mr. Giese in the course of his duties became aware of the November 13, 1981 Minnesota Fats advertisement after it had appeared in the Chicago Sun-Times. A representative from North American was instructed to call upon

Minnesota Fats after the ad appeared for the sole purpose of attempting to get the officers of Minnesota Fats to delete any reference to the "PAC-MAN" game in any future advertising.

35. Mr. Giese testified that as far as he knows it is the policy of North American to avoid any reference to the "PAC-MAN" game because North American wants and intends to have the "K. C. MUNCHKIN" game represented to purchasers and ultimately bought by them on its own merits.

36. The November 13, 1981 advertisement on which the plaintiffs rely to support their charges of unfair competition and palming off does not suggest that the "K. C. MUNCHKIN" game is a game of the plaintiff Atari. The plaintiffs did not attach the entire advertisement of Minnesota Fats to the complaint, but it does appear from the entire advertisement which was included on the page of the Chicago Sun-Times which was submitted to the Court that in at least two-thirds of that advertisement, it is Atari games that are advertised by Minnesota Fats. They are separated from the ad for the "K. C. MUNCHKIN" game which clearly carries the defendant North American's mark ODYSSEY and also the mark "MAGNAVOX" which North American has used in conjunction with such games in the past. Moreover, a third box which is a portion of the entire Minnesota Fats advertisement carries the name of a well-known third party in the home video game field, and the viewer's impression from the ad is that

Minnesota Fats is advertising distinctively the products of the plaintiff Atari, of the defendant North American, and of the third party.

37. The Court can find no intent of the defendants to palm off the "K. C. MUNCHKIN" game as the plaintiffs' "PAC-MAN" game or as being authorized or connected in any way with the plaintiffs' games.

38. There is no evidence to show any confusion in the people who would use the plaintiffs' "PAC-MAN" game and North American's "K. C. MUNCHKIN" game. The advertisement, even though it refers to "PAC-MAN" can, at most, be attributed to a zealous advertising person who apparently wished to editorialize on a game comparison with "PAC-MAN." There is no evidence which even suggests that either of the defendants either instigated or attempted to take any advantage from the activity of the ad man from Minnesota Fats.

39. North American would be greatly injured by the entry of a preliminary injunction and there is no irreparable harm to the plaintiffs which has been brought out by the evidence. In particular, there is no evidence of any palming off or any attempt to palm off the "K. C. MUNCHKIN" game cartridge by anyone or by anyone connected with the defendants. North American's positive program of avoiding even a possibility of confusion between its "K. C. MUNCHKIN" game and the "PAC-MAN" game shows no sign of abatement.

Defendants cannot be held responsible for an independent act by Minnesota Fats which, in itself, was not a source of confusion. As noted above, the concept of plaintiff's "PAC-MAN" game is only generally similar to the defendants' "K. C. MUNCHKIN" game, namely, both are in the genre of chase games, in a maze in which the central character either gobbles or is gobbled by its enemies. Also, as detailed above, the appearance of the defendants' "K. C. MUNCHKIN" game is very different from the plaintiffs' "PAC-MAN" game. The fact that they both display a maze and characters that eat each other is merely a result of building two different games on an available concept.

40. North American would suffer a severe financial hardship if a preliminary injunction were entered. Plaintiffs' "PAC-MAN" game is not on the home video market at the present time, and it is impossible to tell today what the appearance or form of the plaintiffs' home video version of "PAC-MAN" will be. North American, on the other hand, is actively manufacturing, shipping and advertising the "K. C. MUNCHKIN" game cartridge. There is, in other words, no direct competition between the home video games of the parties so far as the concept of a maze/chase game having a central character who gobbles dots and who chases or is chased by goblins or enemies is concerned. Moreover, North American's "K. C. MUNCHKIN" cartridge is usable only in its

ODYSSEY² console. Plaintiffs have never made a cartridge for the ODYSSEY² console. Thus, the parties are not competitive to sell to the same customers.

41. North American's present investment, in terms only of the number of dollars invested in inventory, goods in process and advertising which is either already out or committed, is in excess of \$3,000,000. In addition, lost profit on "K. C. MUNCHKIN" cartridge sales will amount to an additional \$5,000,000. Finally, Mr. Staup estimates that the loss of business momentum and image would result in an additional \$4,000,000. Because of the short lifetimes of games of this type, such an investment would probably be destroyed by the entry of a preliminary injunction. Furthermore, a preliminary injunction would interrupt North American's moral commitments to its dealers and would have an adverse effect upon North American's sales of its other video games and products.

42. There is no corresponding harm of any irreparable nature to the plaintiff Atari or its licensor. Atari has not introduced its "PAC-MAN" game cartridge in the home video market as of the present time, and states that it will not do so until at least sometime in 1982. There is no evidence of what Atari's "PAC-MAN" game for home video will look like, or exactly when it will be introduced. It is at least open to serious question that it will duplicate the

arcade form of the game because of the technical requirements unique to Atari's home video console. Moreover, Atari's affidavit showing in support of its motion for a preliminary injunction shows that at least some of its home video game cartridges which have been developed have been abandoned in the development stage and have never reached the commercial market. Since this may also happen to the home video form of "PAC-MAN" which Atari says it has in the development stage now, there can be no assurance that the home video version of "PAC-MAN" will be offered for sale to the public.

43. The plaintiff Atari enjoys a strongly dominant marketing position in the home video games market and will not be seriously injured in its relations with its dealers by the appearance of the "K. C. MUNCHKIN" game at the present time. The Atari dealers do not have the "PAC-MAN" game yet, and even if they did, the "K. C. MUNCHKIN" game would not replace it because the Atari equipment does not accept the North American home video cartridges. The North American "K. C. MUNCHKIN" game only fits in the North American equipment, and there is no evidence that home video game purchasers would be inclined to go to the expense of purchasing Atari equipment just to get the "PAC-MAN" game or purchasing the ODYSSEY² console just to get the "K. C. MUNCHKIN" games.

44. Any injury which might accrue to the plaintiffs from the sales of the "K. C. MUNCHKIN" game can readily be determined when the entire merits of this action are tried and those injuries can be compensated for in money damages. At the present time, such damages are entirely speculative in the home video game field.

45. The ordinary observer familiar with electronic games would not be likely to believe that the "K. C. MUNCHKIN" game is a copy of the "PAC-MAN" game or even substantially like the "PAC-MAN" game.

46. It does not appear to the Court after hearing the evidence adduced and particularly after having viewed both the "PAC-MAN" game and the "K. C. MUNCHKIN" game that the plaintiffs have such a substantial likelihood of prevailing on the trial of the merits of the case that a preliminary injunction should be entered at this time.

47. Every statement in the foregoing findings of fact which may be deemed to be a conclusion of law is a proper conclusion of law.

CONCLUSIONS OF LAW

1. Title 17, United States Code, §102(a) provides that copyright protection subsists in original works of authorship which include audiovisual works. Section 102(b) provides, however:

"*** In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

Plaintiffs are not entitled to extend their copyright on the "PAC-MAN" audiovisual work to the "K. C. MUNCHKIN" game because, at most, the idea of a central gobbling character moving about a maze, pursuing goblins, or being pursued by goblins, which appears in both games, is not protectible under the copyright statute.

2. The plaintiffs are not entitled to a preliminary injunction. The law is well settled that the party seeking this relief must show both irreparable injury and either (1) a likelihood of success on the merits, or (2) sufficiently serious questions going to the merits to make them fair ground for litigation and a balance of hardships tipping decidedly in its favor, Jackson Dairy, Inc. v. H. P. Hood & Sons, Inc., 596 F.2d 70, 72 (2 Cir. 1970).

3. Plaintiffs, in order to prevail on their claim for copyright infringement, must prove (1) ownership of the copyrighted work, (2) access thereto by defendants, and (3) a substantial similarity to the copyrighted work, Durham Industries, Inc. v. Tomy Corp., 630 F.2d 905, 911 (2 Cir. 1980. The dispute at this time on plaintiffs' motion for a preliminary injunction centers on whether defendants'

"K. C. MUNCHKIN" game bears a substantial similarity to the copyrighted "PAC-MAN" game. The Court concludes, as a matter of law, that the plaintiffs have failed to show the required degree of substantial similarity.

4. "Substantial similarity" is to be determined by the "ordinary observer" test. There is substantial similarity where the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same, Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2 Cir. 1960). Stated otherwise, the substantial similarity test is whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work, Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021, 1022 (2 Cir. 1966).

5. It is an axiom of copyright law that the protection granted to a copyrightable work extends only to the particular expression of an idea and never to the idea or the concept itself, Mazer v. Stein, 347 U.S. 201, 217, 74 S.Ct. 460, 470, 98 L.Ed. 630, 642 (1954); Baker v. Selden, 101 U.S. 99, 102-103, 25 L.Ed. 841, 843 (1879).

6. Plaintiffs are not entitled to a monopoly of mere characters. They may not claim a protected interest in them. Rather, to warrant an injunction, they must show that the concrete expression of their copyrighted work has been

appropriated by the defendants, Warner Bros., Inc. et al. v. American Broadcasting Companies, ¶25,239, CCH Copyright Law Reporter (S.D.N.Y. 1981), affirmed, ¶25,284 CCH Copyright Law Reporter (2 Cir. 1981). The Court concludes that the plaintiffs have not met this test.

7. Copyrights on television games do not extend to the manner of play of the game, but cover at most any originality in the shape, appearance, and manner of motion of the game characters, Midway Mfg. Co. v. Artic International, Inc., No. 80 C 5863 (N.D.Ill., Decker, J., June 2, 1981), Midway Mfg. Co. v. Universal Co. Ltd., No. CV80-2412 (C.D.Cal., Walters, J., July 24, 1980). The characters of defendants' "K. C. MUNCHKIN" game do not have the shape, appearance, or manner of motion of the game characters of plaintiffs' "PAC-MAN" game.

8. The plaintiffs have failed, as a matter of law, to show by their evidence that they would be so irreparably injured by the defendants' acts as to warrant the entry of a preliminary injunction.

9. Even as to protected aspects of a work, it should be emphasized that under the law only substantial similarity of more than the concept or idea will support a determination of infringement. The ordinary observer test focuses on the similarities and not the differences. Numerous differences, as shown in the evidence in this case,

tend to undercut any allegation of substantial similarity, Durham Industries, Inc. v. Tomy Corp., supra, 630 F.2d at 913; Herbert Rosenthal Jewelry Corp. v. Honora Jewelry Co., 509 F.2d at 64, 65 (2 Cir. 1974).

10. The Court concludes, as a matter of law, that the plaintiffs have failed to show that the defendants, or either of them, have committed any acts which constitute deceptive trade practices in violation of the Illinois Uniform Deceptive Trade Practices Act, Ill.Rev.Stat., ch. 121-1/2, §§311-317.

11. The Court concludes, as a matter of law, that the plaintiffs have failed to show that the defendants, or either of them, have committed any acts which constitute improper or unfair competition in violation of plaintiffs' rights at common law.

12. Every statement in the foregoing conclusions of law which may be deemed to be a finding of fact is supported by the evidence.

United States District Judge

Dated: November __, 1981

CERTIFICATE OF SERVICE

It is hereby certified that copies of the foregoing DEFENDANTS' PROPOSED PRELIMINARY FINDINGS OF FACT AND CONCLUSIONS OF LAW were served upon the attorneys for the plaintiffs by delivering copies to them at the following addresses:

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all this 25th day of November, 1981.


